(5)

No. 90-102

In the Supreme Court of the United States

OCTOBER TERM, 1990

LIBERTY COUNTY, FLORIDA, ET AL.,
AND
LIBERTY COUNTY SCHOOL BOARD, ET AL.,
PETITIONERS,

v.

GREGORY SOLOMON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

KENNETH W. STARR
Solicitor General

JOHN R. DUNNE
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

ROGER CLEGG
Deputy Assistant Attorney General

JAMES A. FELDMAN
Assistant to the Solicitor General

JESSICA DUNSAY SILVER
SUSAN D. CARLE
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the decision of the court of appeals, which remanded this case to the district court for further proceedings, is ripe for review by this Court at this time.

2. Whether the court of appeals erred in holding that a 51% black voting age population sufficed to meet the threshold requirement for a vote dilution claim that the minority group "demonstrate that it is sufficiently large and geographically compact to constitute a majority in a singlemember district" under *Thornburg* v. *Gingles*, 478 U.S. 30, 50 (1986).

3. Whether the court of appeals erred in ruling that the uncontroverted statistical evidence established as a matter of law the three factors necessary to prove a vote dilution claim under *Gingles*.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statute and rule:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-102

LIBERTY COUNTY, FLORIDA, ET AL.,

AND

LIBERTY COUNTY SCHOOL BOARD, ET AL.,

PETITIONERS,

v.

GREGORY SOLOMON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Liberty County, Florida, elects its Board of County Commissioners and its School Board from the county at-large. Both boards have five members who serve staggered four-year terms. The County is divided into five residence districts, and candidates must run for the seat on the Board of County Commissioners or School Board that corresponds to the

district in which they live. All voters in the county vote for one candidate from each district in both primary and general elections. A majority vote requirement applies in primaries, but candidates may win by a plurality of votes in general elections. Pet. App. A4-A5.

Blacks constitute 11% of the total population of Liberty County (Pet. App. A6, A162, A216) and 51% of the voting age population of District 1 (*id.* at A20, A162 & A201 n.10). No black candidate has ever won election to countywide office in Liberty County (*id.* at A25, A218, A247).

2. Respondents, four black County residents, brought suit on behalf of themselves and others similarly situated alleging that the at-large system of electing the Board of County Commissioners and School Board diluted the voting strength of black voters in violation of Section 2 of the Voting Rights Act, 42 U.S.C. 1973. Pet. App. A214-A215.

The district court certified the class and held a trial in March 1986. Pet. App. A216. In ruling on respondents' claims, the court evaluated the record under each of the "totality of the circumstances" factors listed in the Senate Report accompanying the 1982 amendments to Section 2. See Pet. App. A218. The court found that respondents had shown several factors in their favor. They had presented "irrefutable" evidence that Liberty County in the past had adopted "[a] pervasive official policy of restricting the opportunities of blacks to register, vote, and otherwise participate in the election process." *Id.* at A219. In addition, the court observed that "[n]ot a single black citizen has ever been elected to countywide office in Liberty County." *Id.* at A247. The court also noted that the majority vote requirement in party primaries and the expense of campaigning

over a "vast area" that includes the entire county "[o]n balance, * * * may enhance the opportunity to discriminate against blacks in the election process." *Id.* at A238. Finally, the court concluded that elected officials showed a significant lack of responsiveness to black residents' interests. *Id.* at A249.

On the other hand, the court ruled that, although respondents' evidence of racial bloc voting was statistically significant (Pet. App. A224), "the overall degree of racial polarization * * * has not been proved to be *legally* significant." *Id.* at A225 (emphasis in original). The court reached this conclusion on several grounds: the evidence showed that black candidates received some degree of white support (*id.* at A230); there had been too few elections in which black candidates ran for countywide office (*id.* at A231-A232); the evidence showing black polarization in state and national elections failed to show comparable bloc voting by whites (*id.* at A234); and respondents' statistical techniques relied on too many inferences to be reliable (*id.* at A235-A236).

In addition, the court held that respondents had failed to demonstrate that they had the potential to elect representatives from District 1, because blacks constituted only 49% of the total population and 46.2% of the registered voters in that district (Pet. App. A254).[1] The court also found that the record did not establish that blacks had been denied access to informal slating processes (*id.* at A239); that recent elections had not been characterized by racial appeals (*id.* at A245-A246); that the lingering effects of past discrimination did not pose a significant

[1] The district court cited no figures for voting age population.

obstacle to black political participation in recent years (*id.* at A271-A273); and that the policies underlying the county's at-large election of county commissioners and school board members were not tenuous (*id.* at A251-A252).

Weighing all of these factors (*id.* at A261-A277), the court concluded that "[t]he totality of the circumstances * * * does not support the claim that at-large elections result in dilution of the black vote." *Id.* at A276. The court therefore entered judgment for petitioners by opinion and order of May 4, 1987.

3. On appeal, a panel of the Eleventh Circuit vacated and remanded the case to the district court. Chief Judge Tjoflat's opinion for the panel explained (Pet. App. A162-171) that the district court had erred in rejecting respondents' proof of the three factors necessary to prove a dilution violation under *Thornburg* v. *Gingles*, 478 U.S. 30 (1986). Of the other Senate Report factors relevant to the totality of the circumstances inquiry, the panel found that the district court had made legally correct and factually adequate findings with respect only to two: lingering effects of past discrimination (the panel found none that affected black political participation, see Pet. App. A185-A187) and election of minorities (none had ever been elected, see Pet. App. A187-A188). In the panel's view, the district court's analysis of each of the other factors was either "taint[ed]" by virtue of its employment of an "incorrect legal standard in analyzing the evidence" or simply was not "adequate for appellate review." Pet. App. A172. See *id.* at A172-A195. The panel concluded that the case should be remanded to the district court for further findings of fact. Finally, the panel indicated that the totality of the circumstances inquiry ulti-

mately should be directed to a determination of whether respondents had established that the discriminatory effect of the system was "driven by racial bias in the community or its political system" that promised to continue in the future. *Id.* at A152.

4. The Eleventh Circuit granted rehearing en banc, and vacated the panel's opinion. Pet. App. A128. Holding that "as a matter of law * * * the appellants have satisfied the three *Gingles* factors" (*id.* at A2), the en banc court unanimously agreed that the district court's judgment should be vacated and the case remanded for further proceedings in accordance with *Gingles*. The court was equally divided, however, on the legal effect of proving those factors; as a result, the en banc court ordered the district court to give "due consideration to the views expressed in Chief Judge Tjoflat's and Judge Kravitch's specially concurring opinions." Pet. App. A3.

a. In her special concurrence, Judge Kravitch, joined by four circuit judges, explained that the undisputed evidence showed that blacks constituted 51% of the voting age population of District 1,[2] thus satisfying the *Gingles* requirement that the minority group be of sufficient size and compactness to have the potential to elect candidates in a single-member district. Pet. App. A19-A21. In addition, respondents' uncontroverted statistical evidence of black political cohesiveness was substantially similar to that which this Court in *Thornburg* v. *Gingles* held to demonstrate that black support for black candidates was "overwhelming" (Pet. App. A23-A24), and thus

[2] As the panel opinion had recognized, respondents' evidence that blacks constituted 51% of the voting age population of the district was "not contested by [petitioners]." Pet. App. A201 n.10.

was sufficient as a matter of law to show cohesiveness. Finally, respondents' statistical evidence, showing bloc voting by whites sufficient to defeat the black candidate in all cases, sufficed to meet the *Gingles* requirement that white bloc voting usually defeats the minority-preferred candidate. *Id.* at A24-A26.[3] While white voting was less polarized than black voting, this fact did not detract from the legal sufficiency of respondents' showing. *Id.* at A25.

Although Judge Kravitch would hold that proof of the three *Gingles* factors was sufficient in this case to make out a Section 2 vote dilution claim (Pet. App. A18), she also noted that "[respondents] * * * adduced strong evidence establishing the other supportive factors." *Id.* at A29 n.3. In her view, analysis of those other factors is relevant primarily "for the light they shed on the existence of the three core *Gingles* factors." *Id.* at A17-A18. She thus concluded that "[o]n the totality of the evidence in the instant record, plaintiffs have clearly established their claim" (*id.* at A29 n.3). In her view, the case had to be remanded only for further proceedings regarding a remedy for the Section 2 violation.

b. Chief Judge Tjoflat, joined by three circuit judges and Senior Circuit Judge Hill, agreed with Judge Kravitch's conclusion that respondents had proved the three *Gingles* factors. Pet. App. A107-A108. According to Chief Judge Tjoflat, however,

---

[3] Judge Kravitch explained that, while she rejected the district court's conclusions concerning the legal insignificance of respondents' statistical evidence under a de novo standard of review, she rejected the district court finding that the statistical evidence was unreliable as clearly erroneous because it was not supported by record evidence. Pet. App. A30-32 n.6.

the history of the Voting Rights Act demonstrated that satisfying the three *Gingles* factors was, standing alone, insufficient to prove a violation of Section 2, at least where the defendant introduced evidence of other Senate Report factors in rebuttal. Renewing the analysis set forth in his panel opinion, Chief Judge Tjoflat concluded that a Section 2 defendant may rebut a plaintiff's showing under the three *Gingles* factors by proving "with evidence of objective factors that, under the totality of the circumstances, * * * the voting community is not driven by racial bias." Pet. App. A103. See also *id.* at A44, A78-A79, A94-A95. In his view, the case had to be remanded so that the district court could decide whether petitioner had carried this burden. *Id.* at A108.

DISCUSSION

In *Thornburg* v. *Gingles*, 478 U.S. at 42-61, this Court held that, while all of the factors listed in the Senate Report accompanying passage of the 1982 amendments to Section 2 of the Voting Rights Act are relevant to the vote dilution inquiry, Section 2 challenges to use of multimember districts generally require, as "necessary preconditions" (*id.* at 50), a three-part showing that: (1) minority voters are a sufficiently large and compact group to form a majority of the electorate in a single-member district (*id.* at 50 & n.17); (2) the minority group is politically cohesive (*id.* at 51); and (3) the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate (*ibid.*). In our view, the en banc Eleventh Circuit correctly applied these legal principles when it ruled, unanimously, that respondents' undisputed statistical evi-

dence sufficed to meet the three *Gingles* factors. No aspect of this ruling warrants this Court's review.

The Eleventh Circuit was divided on the legal effect of satisfying the *Gingles* factors in applying the totality of the circumstances test. This question may well prove to be an important one, but this case does not provide an appropriate vehicle for its consideration.[4] That question would be more fruitfully considered after the district court has had the opportunity to develop a more adequate factual record on remand and after the Eleventh Circuit—and other courts—have had the occasion to review the issues as they apply in other cases.

1. Petitioners argue (Pet. 1-13) that this Court should grant certiorari in order to "clarif[y] * * * the legal effect of the three *Gingles* threshold factors" (Pet. i)—the issue that divided the Eleventh Circuit in this case. Although the Eleventh Circuit did indeed split over whether it is necessary to show that community voting patterns are "driven by racial bias" to establish a vote dilution claim (compare Pet. App. A28-A29 n.3 (Kravitch, J., concurring) with *id.* at A78-A79, A103 (Tjoflat, C.J., concurring)), that issue is not appropriate for further review at this time.

a. In general, interlocutory review by this Court is disfavored. See, *e.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & A. R.R.*, 389 U.S. 327 (1967); see generally R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 224-226 (6th ed. 1986). Jurisdiction over nonfinal orders is "to be exercised

---

[4] Contrary to petitioners' assertion (Pet. 9), we do not read Judge Kravitch's opinion to "effectively eliminate[] the totality-of-the-circumstances test." In our view, the Eleventh Circuit divided over the *role* of that test in Section 2 analysis, not over whether it is an appropriate part of the analysis.

sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." *Hamilton-Brown Shoe Co.* v. *Wolf Bros.*, 240 U.S. 252, 258 (1916) (citations omitted); see also *American Constr. Co.* v. *Jacksonville, T. & K. Ry.*, 148 U.S. 372, 384 (1893) (Court should not review interlocutory order "unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause").

b. We can see no reason to depart from the general rule in this case. As is usual in cases involving interlocutory appeals, the legal issue on which review is sought may well become moot after remand. If the district court, for example, finds that the voting patterns at issue here were "driven by racial bias," the disagreement among the court of appeals judges would become purely academic.[5] Indeed, recognizing that circumstances could exist in which the two approaches outlined by the en banc court would converge, an Eleventh Circuit panel recently remanded a Section 2 case to a district court, observing "that under either view of the *Solomon* en banc court, the plaintiffs might be entitled to relief." *Meek* v. *Metropolitan Dade County*, 908 F.2d 1540, 1549 (1990).

Petitioners assert that this Court's failure to resolve the issues in this case will impose "enormous burdens * * * upon the judiciary" and will require expenditure of "untold litigation hours and ex-

---

[5] Indeed, proof of persistent racial polarization in voting—a fact that the Eleventh Circuit unanimously agreed was present in this case—may itself serve as potent evidence that racial considerations motivate voter behavior. Cf. *Gingles*, 478 U.S. at 105 (O'Connor, J., concurring) ("Proof that white voters withhold their support from minority-preferred candidates to an extent that consistently ensures their defeat is entitled to significant weight in plaintiffs' favor.").

pense * * * in this and like cases" (Pet. 46-47), but they offer no support for their jeremiads. Significantly, petitioners cite no other post-*Gingles* appellate case in which a court has found it necessary even to consider, much less resolve, the question that divided the Eleventh Circuit here. The absence of other appellate cases suggests not only that failure to resolve the issue now may have limited effects beyond this particular litigation, but that the Court may profit from permitting other courts of appeals to consider the question in a variety of factual contexts.

In addition, review at this juncture would require the Court to grapple with the issues at a highly abstract level. As Chief Judge Tjoflat explained in his panel opinion, the district court's findings of fact were inadequate to permit "full appellate review" in light of his proposed approach. Pet. App. A159.[6] As a result, Chief Judge Tjoflat was unable to apply his approach to the facts of this case or to demonstrate how findings regarding the various Senate Report factors should be combined and assessed to ar-

---

[6] For example, Chief Judge Tjoflat pointed out that the district court failed to identify specifically which official acts left a legacy of discrimination (Pet. App. A173), to determine whether such acts still influence political behavior (*id.* at A174), and to consider adequately the continuing significance of the state legislature's discriminatory intent in prescribing an at-large system for school board elections in 1947 (*id.* at A176-A177). Nor had the district court adequately justified its conclusion that the informal, white-controlled slating process in Liberty County was open to black candidates who wished to represent black interests (*id.* at A183-A185). The district court's opinion also left unexplained the reasons for adoption of a majority vote requirement for primaries and the effect of this factor on the ability of blacks to participate in the political process (*id.* at A183).

rive at an ultimate conclusion concerning whether "racial bias" drives the county's voting behavior. For this Court to attempt to resolve the legal issues on what the Eleventh Circuit recognized to be an inadequate factual record could have at least two unfortunate consequences.

First, this Court would have to decide important questions of law without knowing how its decisions apply to a particular set of facts. Indeed, Chief Judge Tjoflat commented that interpreting Section 2 in accord with Congress's intent requires that courts "develop a burden of proof for section 2 plaintiffs that is neither too heavy nor too light." Pet. App. A105. It is difficult to determine whether a particular response to the question that divided the Eleventh Circuit—the role of the totality of the circumstances test in Section 2 analysis—imposes a burden that is "just right" (Pet. App. A106) without reviewing its application to a particular set of facts. This difficulty is particularly pronounced in light of the highly fact-specific nature of the totality of the circumstances inquiry.[7]

Second, articulating a specific legal standard may be less important and provide less guidance to the lower courts than the application of that standard to

---

[7] In his panel opinion, Chief Judge Tjoflat emphasized the fact-specific nature of his approach. The opinion noted that, "[a]s in any case in which the plaintiff's claim is based on circumstantial evidence, the ultimate findings of fact [concerning the application of the Senate Report factors] must, in most instances, be supported by a solid base of subsidiary findings of fact. These subsidiary findings are essential because they allow the court to judge the strength of its ultimate findings of fact and thus the weight those findings should be given when assessing the totality of circumstances as a whole." Pet. App. A182.

a particular set of facts. Review at this time would require the Court to assess Chief Judge Tjoflat's approach absent such a factual context, and thus the Court's determination could easily fail to clarify those aspects of Section 2 that remain uncertain. In short, because this case would require the Court to make important decisions against a background of largely hypothetical facts, interlocutory review is unwarranted.

2. Petitioners argue (Pet. 13-19) that this Court should grant certiorari to review the en banc court's unanimous holding that a voting age population of 51% in District 1 sufficed to establish the first *Gingles* factor. This holding involves application of the first *Gingles* requirement that the minority group "demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district" (478 U.S. at 50). Petitioners argue that the Eleventh Circuit's application of this factor created "not only * * * a right to proportional representation, but a right to *disproportional* representation" (Pet. 17), because blacks constitute only 11% of the total population of the County, which is divided into five districts.

Petitioner's contention is mistaken.[8] By its terms, *Gingles* frames the inquiry simply in terms of whether the plaintiff class would be able to elect representatives from a single-member district. As the Court explained, the issue is whether the at-large

---

[8] Petitioners' discussion of a "right to disproportional representation" (emphasis omitted) in any event rests on a mischaracterization. If respondents are entitled to a remedy in this case, that remedy at best would create a district in which the minority voters would have the *opportunity*—not the right—to elect the candidate of their choice.

system is "responsible for minority voters' inability to elect its candidates." 478 U.S. at 50. In turn, that question is answered by examining the outcome that would occur under a single-member district plan, "because it is the smallest political unit from which representatives are elected." *Id.* at 50 n.17. The Eleventh Circuit in this case simply applied those holdings to the facts of this case.

The Court in *Gingles* expressly recognized that measuring minority voting strength in terms of potential to succeed in a single-member district produces results different from those that would obtain if minority voting strength were evaluated on a proportional basis. See *Gingles*, 478 U.S. at 50-51 n.17. Precisely because Section 2 does not create a right to proportional representation, the relevant question is not how many minority voters live in the county, but whether use of single-member districts could remedy dilution of the voting strength of a plaintiff class. *Ibid.*[9] By focusing on the percentages of blacks in the County as a whole rather than the ability of blacks to elect a representative of their choice from a single-member district, it is petitioners—not the court below—that rely on notions of proportional representation.

3. Finally, petitioners contend (Pet. 27) that the en banc court misapplied the clearly erroneous standard of Fed. R. Civ. P. 52(a) in holding that respondents had satisfied the three *Gingles* factors as a

---

[9] Petitioners' suggestion that the court of appeals' holding implies "requiring the creation of more seats so as to accommodate an even tinier minority group" (Pet. 18) is meritless. The opinions contain no such implication.

matter of law. As this Court stated in *Gingles*, "Rule 52(a) 'does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law.'" 478 U.S. at 79 (citations omitted). But each of the rulings about which petitioners complain involved the correction of an error of law, and the court relied on uncontroverted evidence in the record in reaching its conclusions. In any event, an error regarding Rule 52(a)'s application to the facts of this case would not warrant further review.

With respect to the first *Gingles* factor (see Pet. 28-32), the district court, relying on statistics showing that blacks did not constitute a majority of the population or a majority of registered voters in District 1, held that they were not sufficiently numerous to form a majority of the electorate in that district. Citing *Gingles*, the Eleventh Circuit panel held that voting age population was a more apt measure of whether blacks could form a majority of the electorate than was their proportion of the entire population or of the registered voters in the county. Pet. App. A163. See also *City of Rome* v. *United States*, 446 U.S. 156, 186 n.22 (1980). Respondents' evidence that blacks constituted 51% of the voting population of District 1 was "not contested by [petitioners]" (Pet. App. A201 n.10); accordingly, the panel was correct in relying on it to find that the first *Gingles* factor was satisfied. Pet. App. A162. That finding was subsequently accepted in the en banc proceeding by both Judge Kravitch (*id.* at A20) and Chief Judge Tjoflat (*id.* at A108).

With respect to the second *Gingles* factor (see Pet. 33-36), the district court rejected respondents' evidence of racial bloc voting on the ground that it was "satistically signiticant" (Pet. App. A224), but not "legally significant." *Id.* at A225. The panel found that respondents' uncontroverted statistics regarding 16 elections showed that, with only one arguable exception, the levels of black cohesiveness fell within the range found to be legally significant in *Gingles*. See Pet. App. A167-A168. Once again, that finding was accepted by both Judge Kravitch (*id.* at A22-A24 & A35-A38 nn.9-10) and Chief Judge Tjoflat (*id.* at A108), and was fully in accord with *Gingles*.

Finally, petitioners are incorrect in claiming (Pet. 36-38) that respondents did not present the evidence necessary to assess whether white bloc voting usually led to the defeat of minority-preferred candidates. Respondents presented figures for white bloc voting in six county-wide elections involving black candidates. At the levels of white bloc voting observed, the coalition of black and crossover white voters would *always* suffer defeat in countywide elections (Pet. App. A25 & A39 nn.13-14, A180-181). This showing suffices to satisfy *Gingles*' definition of legally significant white bloc voting. 478 U.S. at 56. Indeed, this Court noted in *Gingles* that, "where a minority group has begun to sponsor candidates just recently, the fact that statistics from only one or a few elections are available for examination does not foreclose a vote dilution claim." *Id.* at 57 n.25. Petitioners' argument that respondents' evidence was insufficient is therefore mistaken and, in any event, does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JOHN R. DUNNE
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

ROGER CLEGG
Deputy Assistant Attorney General

JAMES A. FELDMAN
Assistant to the Solicitor General

JESSICA DUNSAY SILVER
SUSAN D. CARLE
Attorneys

NOVEMBER 1990

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 282681 20218